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IN THE

Supreme Court of The United States

OCTOBER TERM, 1997

HOECHST CELANESE CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief Amici Curiae
of the
AMERICAN INSTITUTE OF CHEMICAL ENGINEERS, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, NUCLEAR ENERGY INSTITUTE, SCIENCE & ENVIRONMENTAL POLICY PROJECT, INC., SOCIETY OF PLASTICS ENGINEERS and TEXAS INSTITUTE FOR ADVANCEMENT OF CHEMICAL TECHNOLOGY, INC.
joined by the
CHEMICAL INDUSTRY COUNCIL OF NEW JERSEY, MANUFACTURERS AND CHEMICAL INDUSTRY COUNCIL OF NORTH CAROLINA, NORTH CAROLINA CITIZENS FOR BUSINESS AND INDUSTRY, SOUTH CAROLINA CHAMBER OF COMMERCE, SOUTH CAROLINA MANUFACTURERS ALLIANCE and VIRGINIA MANUFACTURERS ASSOCIATION
IN SUPPORT OF PETITIONER

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IN SUPPORT OF PETITIONER

This brief *amici curiae* of the American Institute of Chemical Engineers, *et al.*, is submitted in support of the petition for a writ of certiorari filed by Hoechst Celanese Corporation (HCC).[1] The petition seeks review of the

[1] No portion of this brief was authored by counsel for a party, and no person or entity other than the amici curiae and their members are

judgment and opinion of the United States Court of Appeals for the Fourth Circuit in *United States v. Hoechst Celanese Corp.*, 128 F.3d 216 (1997) (reproduced at Pet. App. 1a-33a).

INTRODUCTION

Amici American Institute of Chemical Engineers, *et. al.*, include a number of nonprofit scientific and engineering organizations representing a broad cross section of those professions. In the conduct of their professional responsibilities, *amici* and their members are frequently required to interpret regulatory terms and standards. They cannot meet that responsibility unless regulatory requirements are stated clearly and the terms used are given their plain and natural meaning. *Amici* share a common concern which is also the focus of HCC's petition and fundamental to achieving the purposes underlying a broad range of regulatory standards that govern scores of industries: the ability of the regulated community to rely on the customary, natural meaning of the terms used in regulations when determining the obligations that arise under those regulations.

In addressing these critical concerns the scientific and engineering organization *amici* are joined by state-based manufacturing and business associations (also nonprofit). Those associations include thousands of members in the engineering and scientific professions.

More specifically, HCC's petition involves interpretation of a U.S. Environmental Protection Agency ("EPA" or "Agency") regulation, National Emission Standard for Equipment Leaks (Fugitive Emission Sources) of Benzene, 40 C.F.R. Part 61, Subpart J ("NESHAP" or "benzene NESHAP"). Pet. App. 123a-24a (the regulation was adopted pursuant to § 112 of the Clean Air Act, 42 U.S.C. § 7412). The issue presented concerns the meaning of the exemption from the benzene NESHAP that is

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contributing monetarily to the preparation or submission of this brief. The petitioner and respondent have each consented to the filing of this brief and their respective letters of consent have been filed with the Clerk of the Court.

provided in 40 C.F.R. § 61.110(c)(2) for facilities that "produce or use less than 1,000 megagrams of benzene per year." Pet. App. 124a. The federal government's litigation position in the case, which the Fourth Circuit validated, employed a "multiple counting" approach to determine the quantity of benzene that a facility "produced or used" and implement the exemption in section 61.110(c)(2). As *amici* explain below, that "multiple counting" approach distorts the text of the regulation, disregards the pertinent regulatory background in the administrative record, and deviates from the Agency's previous interpretation of the benzene NESHAP. Moreover, EPA's position is directly at odds with the above-described necessity for use of commonly understood terminology by scientists and engineers. Indeed, even the Department of Justice (EPA's counsel) felt constrained to acknowledge (to the trial court) that the benzene NESHAP exemption regulation's failure to employ terms that conveyed the meaning EPA intended was "a mistake" and "an accident." J.A. 000065, 000073[2]; *see also Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976) ("a regulation cannot be construed to mean what an agency intended but did not adequately express").

The consequence for the regulated community is the inability to rely on the previously accepted meaning of regulatory terms or to determine the measures needed to comply with regulatory standards. These concerns transcend this case and will adversely affect *amici* and their members as well as other scientific and engineering professionals who are frequently called upon to interpret regulatory standards in many contexts. Accordingly, *amici* submit that the decision of the court of appeals was incorrect insofar as that court deferred to EPA and upheld the Agency's interpretation of the regulation. To address these matters, *amici* respectfully urge the Court to grant the petition for a writ of certiorari.

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[2] References herein to portions of the record that are not included in the Appendix to the petition but were reproduced in the Joint Appendix before the court of appeals are abbreviated as "J.A. ____."

STATEMENT OF INTEREST OF *AMICI*

As noted above, a number of the *amici* are nonprofit scientific and engineering organizations representing a broad cross section of those professions.

Founded in 1908, *amicus* American Institute of Chemical Engineers (AIChE) is a membership organization providing leadership to the chemical engineering profession. Representing 58,000 members in industry, academia, and government, AIChE provides forums to advance the theory and practice of the profession, upholds high professional standards and ethics, and supports excellence in education.

Amicus National Society of Professional Engineers (NSPE) is a membership organization with 54 state and territorial societies, and over 500 local chapters representing the interests of approximately 60,000 licensed engineers in industry, government, education, construction and consulting practice in the United States. NSPE's mission is to promote the ethical, competent and licensed practice of engineering, and to enhance the professional, social and economic well-being of its members. NSPE represents its members before a variety of forums in connection with various matters of regulatory and public policy that affect the engineering profession.

Amicus Nuclear Energy Institute (NEI) is the organization responsible for establishing unified nuclear industry policy on matters affecting that industry, including a broad array of scientific, technological and regulatory issues. NEI's members include nuclear plant designers, major architect/engineering firms, all utilities licensed to operate commercial nuclear power plants in the United States, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.

Amicus Science & Environmental Policy Project, Inc. (SEPP) is an organization of scientists concerned with informing the public policy forum with sound, factual analysis of critical scientific issues. Guided by an international Board of Science Advisors, SEPP sponsors international scientific

conferences and workshops, publishes policy analyses and critiques by panels of international experts, conducts surveys of specialists on various issues, and disseminates statements to the public and regulatory and legislative forums regarding key environmental policies.

Amicus Society of Plastics Engineers (SPE) consists of more than 35,000 individual plastics professionals located in 70 countries working in 92 local geographical Sections. SPE's members range from corporate presidents to college students, and they are involved in all facets of plastics manufacturing technology and utilization. The Society's objective is the education of its members and promoting knowledge and education regarding plastics and polymers worldwide. This is accomplished through SPE's 20 technical divisions as well as conferences, seminars, technical publications and monthly local Section meetings.

Amicus Texas Institute for Advancement of Chemical Technology, Inc. (TIACT) is concerned with a broad array of scientific and regulatory issues. A principal TIACT objective is the advancement of chemical technology through a better informed public. TIACT achieves that objective through study, evaluation and public dialogue regarding a variety of topics concerned with chemical technology, human health and the environment. TIACT's studies have included chemicals and the causes of cancer, safety in the workplace, assessment of the impact of chlorine on human health and the environment, epidemiological studies of cancer in Texas, hormesis studies (hormesis is the property of a chemical, such as a medicine, to be toxic at high dosages and therapeutic at low dosages), hazardous waste incineration and the twenty-first century work force requirements projected for the chemical and petroleum refining industries. TIACT is headquartered at Texas A&M University in College Station, Texas.

As noted, the serious scientific and engineering concerns raised by the above-described *amici* are also shared by a number of state-based manufacturing and business associations

whose members include thousands of engineering and scientific professionals.

Amicus Chemical Industry Council of New Jersey (CIC/NJ) is a membership association of 105 manufacturers in the chemical process industry with facilities located throughout the state. CIC/NJ coordinates policy for the industry on a variety of matters, including regulatory affairs, education, communications and environmental awareness and protection. CIC/NJ members employ over 104,000 people in New Jersey and produce a variety of materials used in agriculture, manufacturing, construction, mining, textiles, cosmetics and food processing.

Amicus Manufacturers and Chemical Industry Council of North Carolina (MCIC) represents 70 companies and more than 125 industrial facilities in North Carolina. A fundamental objective of MCIC is promotion of sound science, engineering and economics in the legislative and regulatory process. MCIC members employ more than 75,000 North Carolinians engaged in manufacturing a broad range of products. MCIC works in conjunction with state and federal regulatory agencies to provide leadership, information and services in the development of policy, law and regulations regarding the manufacture, use and proper handling of chemicals for the protection of public health and the environment.

Founded in 1942, *amicus* North Carolina Citizens for Business and Industry (NCCBI) is a research organization specializing in public policy and related issues affecting manufacturing and business. With more than 1,800 members, NCCBI is the largest organization of its type in North Carolina. Representing a diverse cross section of the economy, NCCBI's members range in size from small businesses to major corporations, as well as community colleges, universities and allied organizations. NCCBI advocates sound fiscal policies by federal, state and local government, and supports initiatives that will maintain an environmentally sound and diversified economy.

Founded in 1940, *amicus* South Carolina Chamber of Commerce is the state's largest broad-based business and trade association. Operating as a statewide organization, the South Carolina Chamber represents businesses, industries, professions and associations of all sizes and types. The Chamber serves as a forum for consensus building to facilitate presentation of a unified viewpoint in a broad range of public policy and regulatory matters before legislative, regulatory and judicial forums.

Amicus South Carolina Manufacturers Alliance (SCMA) represents more than 80 companies and over 140 industrial facilities in South Carolina. In addition, SCMA members employ more than 80,000 South Carolinians in the manufacture of a wide variety of products. SCMA works closely with state and federal regulatory agencies to provide information, guidance and leadership in the development of laws, regulations and policies regarding environmental protection in South Carolina. SCMA's very active environmental committee consists of the state's leading scientists and engineers, who have responsibility for environmental management and compliance at their respective companies. SCMA promotes sound engineering, science and economics in both the legislative and regulatory processes.

Amicus Virginia Manufacturers Association (VMA) represents approximately 500 manufacturing industries in Virginia. VMA's Environmental Affairs Committee is composed of over 80 active members and seven subcommittees which monitor and submit comments on virtually all regulatory, legislative and judicial matters concerning state government regulation of the environment in Virginia, as well as federal matters of particular concern to VMA members, such as this case. The members of VMA's Environmental Affairs Committee are engineers and scientists that have primary responsibility for environmental management and compliance at their industrial facilities.

REASONS FOR GRANTING THE WRIT

I. EPA's Multiple Counting Interpretation Jettisons The Administrative Record And The Accepted Meaning Of The Engineering And Scientific Terms At Issue

The issue underlying HCC's petition is whether the company's Rock Hill, South Carolina chemical manufacturing plant ("the Celriver Plant") qualified for an exemption from the benzene NESHAP. The exemption is available for "[a]ny equipment in benzene service that is located at a plant site designed to produce or use less than 1,000 megagrams of benzene per year." 40 C.F.R. § 61.110(c)(2); Pet. App. 124a. The exemption was intended to reach plants that, relatively speaking, were not cost-effective to regulate. Pet. App. 4a. The court of appeals deferred to an administrative interpretation that EPA has itself described (in a closely related benzene regulation) as the "multiple counting" approach. *See* 40 C.F.R. § 61.342(a); Pet. App. 173a. In deferring to that interpretation, the court of appeals rejected the interpretation frequently expressed over the years by EPA, state environmental agencies and others – including unrebutted testimony of scientific and engineering experts – that "use" means "consumption" (referred to by the district court as the "single counting" approach). *See, e.g.*, Pet. App. 42a.

At the outset it should be noted that shared vocabulary between regulators and the regulated community is critical both to accomplishing the purpose of a given regulation and preserving the rights of the regulated. The Fourth Circuit's decision in this case, however, by deferring to EPA's "multiple counting" approach to define "use," disregards the vocabulary on which scientists and engineers rely every day. Under the approach advocated by EPA, the amount of benzene "used" by the Celriver Plant over the course of a year is derived through counting the same benzene over and over again, with the result that the Celriver Plant "used" more than 2.5 million megagrams of benzene each year. *See* Pet. App. 21a, 66a. That contention leads to a very strange anomaly, inasmuch as the U.S. International Trade Commission reports that *total*

annual production (manufacturing) of benzene in the United States during the relevant period was only 5.64 million megagrams.[3] In other words, according to EPA, HCC's Celriver plant used nearly one-half of total annual U.S. production of benzene.

That contention is not credible and graphically demonstrates how EPA's approach disregards a fundamental concept that engineers and scientists frequently address, specifically, that recirculating flows are never to be confused with throughput. This is illustrated by the customary mental construct of a "black box." For every "black box" input by flow is equal to output by flow plus output by consumption or losses to the environment, such as fugitive emissions (the second component, output by consumption or losses to the environment, is synonymous with throughput). Unrebutted evidence submitted on behalf of HCC demonstrated this point:

> The term "throughput" is ordinarily taken to mean overall net production or consumption, not internal circulation rate. The interpretation that "throughput is intended to mean total cumulative flow through equipment in benzene service rather than net consumption or usage," found in EPA's June 13, 1989 letter to the Celriver Plant [*see* Pet. App. 20a], demonstrates a surprising ignorance of commonly accepted concepts and practices in chemical engineering. As a past President of the American Institute of Chemical Engineers, I am concerned that professionally competent members could pronounce such a radical interpretation without citing authorities and textbooks.

Pet. App. 189a-90a, Initial Report of Dr. James Wei (Professor of Chemical Engineering and Dean of Engineering, Princeton University). Another engineering expert similarly explained:

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[3] See U.S. International Trade Commission, *Synthetic Organic Chemicals, United States Production and Sales, 1990*, USITC Publication 2470, at 2-2 (December, 1991).

> An automobile's cooling system is a simple example of a process unit analogous to a facility that recycles benzene internally. The coolant or antifreeze is recycled through the system when the automobile operates. At the end of a year, the automobile may require the addition of some antifreeze to maintain a full cooling system. The cooling system would be considered to have "used" antifreeze during the year equivalent to the amount purchased and added to the system. Under generally accepted chemical engineering principles, the molecules of antifreeze would not be recounted multiple times as they are recycled in the cooling system in order to calculate a "use" number. Otherwise, the cooling system would be considered to have "used" tens of thousands of gallons of antifreeze over the course of the year. These principles of chemical engineering apply equally to the calculation of benzene used in a facility that recycles benzene internally.

Pet. App. 176a-77a, Initial Report of Dr. E. Bruce Nauman (Professor of Chemical Engineering, The Isermann Department of Chemical Engineering, Rensselaer Polytechnic Institute).

As the court of appeals recognized, Pet. App. 4a, HCC's Celriver Plant used benzene as a catalyst or "reflux agent" that is continually recycled in the process of separating water and other compounds from acetic anhydride and acetic acid. The term "reflux agent" is well-understood by chemical engineers. It means that all benzene recirculates in the process – some directly and some through an impurity-removing mechanism. In this connection it bears emphasis that as EPA was developing the benzene NESHAP in the late 1970's, the Agency was clearly directing its attention to entities that either *produced* (manufactured) benzene or used benzene as a *feedstock*, rather than entities like HCC that employed benzene as a catalyst only. Although HCC's Celriver plant did not produce benzene or use it as a feedstock in any process, at the time of the underlying rulemaking there were many industrial facilities within both of those categories. In fact, when the

administrative record was being developed benzene producers and feedstock users represented 99.5% of the total benzene emissions from all sources.[4] On the other hand, for a myriad of non-producer/non-feedstock users, which included HCC's Celriver Plant (again, all such other uses represented only one-half of one percent of benzene emissions), EPA recognized that an exemption provision was necessary, and the exemption applied to a "plant site" designed to "produce or use" less than 1000 megagrams of benzene annually.

This context is quite important because it provides further confirmation that the focus of EPA's 1984 regulation was the benzene emissions of benzene producers and feedstock users, and that the term "use" in EPA's regulation meant "consumption."[5] Indeed, it is well-documented that numerous engineers, many of whom were employed by EPA and other air quality agencies, looked at the regulation and concluded that "use" meant consumption. For example, the head of the EPA bureau that developed the benzene NESHAP testified that it is "unequivocally clear" that "'internal recycle' – *i.e.*, multiple counting – was never 'considered [n]or suggested as the basis for the NESHAP exemption.'" *See* Pet. App. 61a (district court quoting affidavit of Robert Ajax). In case after case the government scientists and engineers looking at this matter reached similar conclusions, even to the extent of noting that

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[4] See J.A. 000552, JRB Associates Inc., *Materials Balance for Benzene: Level II* (EPA-560/13-80-009, May 1980) (JRB Level II), Def. Exh. 5.

[5] EPA's Background Information Document (BID) for the benzene NESHAP, *see* J.A. 000243, *Benzene Fugitive Emissions – Background Information for Promulgated Standards*, EPA-450/3-80-032b, June 1982, Def. Exh. 10, underscores this point. The BID demonstrates that the 1,000 megagram cutoff in the benzene NESHAP exemption was based on "design production capacity" as represented by a facility's "nameplate" capacity. Production capacity – like nameplate capacity – is a "single count" concept to an engineer, as EPA has recognized in other rulemakings on subjects ranging from capacity to generate electricity to capacity to store oil. In those regulations, EPA uses the term "nameplate capacity" to describe measurement of the underlying subject matter at a fixed point in time. *See* 40 C.F.R. § 72.2 (acid rain program); 40 C.F.R. Part 112, App. E (oil pollution prevention).

HCC "has successfully reduced the consumption of benzene to less than 1000 Mg per year and thus is exempt from the standards" of the benzene NESHAP.[6]

It should also be emphasized that EPA's interpretation of the benzene NESHAP exemption has changed a number of times, especially in the face of litigation, and EPA's regional offices could not agree on how to interpret the regulation. Thus, when HCC sought interpretation from regulators regarding two of HCC's plants in Texas, state regulators and EPA Region 6 confirmed that "use" refers to consumption or inventory. It was only later that EPA Region 4 decided that "use" is determined by recounting the same benzene each time it circulates through a plant. *See* Pet. App. 28a, 32a (EPA bureaucracy "could not itself agree on the proper reading of its own regulation"; EPA "had at least three different approaches for measuring use: (1) consumption of benzene in a year, (2) the throughput of benzene through a plant for a year, and (3) the total quantity in use at the plant").[7]

This case is a poignant example of the administrative-regulatory process not working as it should. To be sure, EPA, like many federal regulatory agencies has a number of responsibilities and *amici* do not advocate a standard of precision beyond that which is reasonable to expect in such

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[6] J.A. 001035, 001036, Def. Exh. 64, Compliance Monitoring Report, Dr. George Marusak, EPA Region IV, December 9, 1986. The same EPA engineer later testified that he had never heard of the "multiple count" approach to benzene "until told by counsel" in connection with this litigation. *See Memorandum in Support of Hoechst Celanese Corporation's Motion for Summary Judgment and Opposition to Plaintiff's Motion for Partial Summary Judgment*, Exh. 32, Deposition of George Marusak, at 170-72; *see also* Pet. App. 57a.

[7] Although an agency's interpretation of its own regulations is generally entitled to judicial deference, that is not true where, as in this case, the agency's interpretation has not been advanced consistently. *INS v. Cardoza-Fonesca*, 480 U.S. 421, 445-46 ns. 29 & 30 (1987). EPA's approach to the benzene NESHAP at issue here has been a "moving target", *see Jersey Central Power & Light Co. v. FERC*, 730 F.2d 816, 822 (D.C. Cir. 1984), rather than a policy to be accorded deference.

circumstances. But if the regulatory process is to function properly, including matters of engineering and scientific terminology such as in this case, the regulated community must be able to rely on the accepted, commonly understood meaning of the terms that comprise regulatory standards. If an agency intends to depart substantially from such commonly accepted meaning, as EPA has done here, the rulemaking process must alert the regulated community of the agency's departure. EPA failed to do so.

II. EPA's Approach Is Unexplained And Unworkable

Aside from being contrary to the accepted meaning of the term "use" and the administrative record, EPA provided no explanation as to how its "multiple counting" approach would be implemented in practice.

More specifically, at no time during the rulemaking for the 1984 benzene NESHAP, or during the intervening fourteen years, did EPA attempt to explain how one would answer the numerous questions that arise when a "multiple counting" approach is applied to even the most simple manufacturing process. For example, nowhere does EPA provide any explanation as to how one would select the individual pieces of equipment necessary to measure the recirculation rate or recycled quantity of benzene. Nor is there any guidance regarding chemical streams that split into substreams (some substreams will recycle their flow while others will not). Also absent is any guidance to address the fact that the different pieces of equipment through which benzene is routed in the manufacturing process may have different rates of flow and volume.[8] Without that information EPA's "multiple count"

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[8] HCC submitted a trial exhibit (*Inconsistent Applications of the 1,000 Megagram NESHAP Exemption*, Revised Attachment H, J.A. 001369) documenting all known post-promulgation instances (during the years 1984-95) in which EPA or a state with EPA-delegated authority to implement the benzene NESHAP determined whether individual plants satisfied the exemption's 1,000 megagram limit. The exhibit shows that the term "use" was more frequently applied as a "single count" rather than "multiple count" concept. But the most significant aspect of the exhibit is the fact that in those instances where EPA applied "use" as a "multiple

approach is entirely arbitrary. It is unlikely that calculations by two qualified individuals, looking at the same facility and conditions, would agree on the amount of benzene "used".

These questions, which EPA has never answered, expose the unworkability of the "multiple count" approach which EPA claims is the basis of the benzene NESHAP exemption. Indeed, a subsequent NESHAP, 40 C.F.R. Part 61, Subpart FF, is powerful evidence that EPA would not have avoided addressing such questions if it had actually intended to adopt "multiple counting" in the Subpart J regulation at issue here. Importantly, the application of Subpart FF is based in part on benzene flow at multiple points within a plant. As a result, the preambles to the proposed and final Subpart FF rules, *unlike* their Subpart J counterparts, explain how one is to determine the location and number of points required to measure recycled volume. *See, e.g.*, 57 Fed. Reg. 8017, 8019-21 (1992); 58 Fed. Reg. 3072, 3076-77 (1993); 40 C.F.R. § 61.355(k)(1)-(2). The extensive analysis of this very issue in the Subpart FF rulemaking shows that calculating benzene use based on "multiple counting" is complex and requires explanation. Such explanation is critical to the scientists and engineers who must implement EPA's regulation, but was completely lacking in this case.

In short, EPA failed to articulate a considered and consistent interpretation of the benzene NESHAP exemption, and has instead been inconsistent and ambiguous and avoided important procedural protections to those who are subject to the rule. The scientific and engineering communities cannot do their jobs properly where they cannot rely on the plain meaning of regulatory terms. To strain the plain meaning of the benzene NESHAP, as EPA has advocated, can only serve "to delay the day" when such regulations will be written so that the regulated community "will be better able to understand and observe

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count" concept the Agency failed to provide any explanation regarding how to determine the number and location of the internal points where benzene flow would be measured, or otherwise provide guidance that is essential to measuring benzene "use" on a "multiple count" basis.

them." *Diamond Roofing Co. v. OSHRC*, 528 F.2d at 650. *Amici* submit that the significance of these issues to a broad range of administrative agency matters and the serious precedential impact of the decision below merit review by this Court.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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